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No. 116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants-Appellants,

against

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Plaintiff-Appellee.

REPLY BRIEF FOR APPELLANTS

I. Appellee conducts resale liquor operations, and is not involved in the continuous shipment of liquors through the State of New York.

Appellee strives in its brief to ignore its resale liquor operations and to treat this case as if it dealt with the continuous shipment of liquors through the State of New York. While appellee no doubt desires to create the impression that it is merely a conduit in the shipment of liquors from an out-of-State distillery to a foreign destination, the impression is a patently false one contradicted both by the trial testimony of its president and by the very allegations of its complaint.

As pointed out in greater detail in our main brief, appellee is a New York corporation (Compl. Par. 2, R. 1) which purchases its liquors from wholesalers in Baltimore, Philadelphia and Washington, D. C. (R. 105, 152) and causes such liquors to be delivered to its unbonded private premises on the second floor of the Arrivals Building at the New York Kennedy International Airport (R. 104-106, 111). At these premises, and at its three additional sales offices at the Pan American Airways and Trans World Airlines Terminal Buildings at Idlewild (R. 99) and the East Side Airline Terminal in Manhattan,* appellee solicits and receives orders and payment for the resale of its liquors to its own customers (R. 4, 111, 143, 145-146). The liquors purchased by appellee for resale remain stored at its private premises for periods of as much as thirty days or more (R. 142) until orders have been received and paid for by their retail customers. Indeed, throughout the time appellee purchases its liquors, and receives delivery and stores them by the case in New York, and until orders for the resale of the individual bottles have been received, it is impossible to determine their final destination (R. 128). Clearly, appellee's purchase and resale operations can in no reasonable sense be treated as involving a "continuous stream" of liquor "passing through New York" (Appellee's Br., pp. 3, 8).

Regardless of the terminology or gimmickry employed by appellee, its operations plainly constitute nothing less than an unlicensed and unsupervised retail liquor business conducted in competition with New York's strictly regulated liquor licensees.

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* See Appellants' Brief, p. 4 n. 2.

II. The "original package" doctrine has no application to this case.

In light of appellee's resale liquor operations, we fail to see any basis for appellee's repeated attempts—for the first time on this appeal—to describe its business as involving "original packages" of liquors for export (Br., pp. 3, 11, 13, 15 and *passim*).

If appellee is now trying to invoke the protection of the export-import clause by reference to the so-called "original package" doctrine, it is completely misinterpreting its purpose and application. That doctrine and the clause upon which it rests (Art. I, § 10, cl. 2) concern only the question of state imposts or ~~export~~ duties on imports or exports. There is, however, no question of state taxation before this Court. We are concerned here only with the question of the constitutionality of the application of New York's liquor licensing statute to appellee's operations. Moreover, it should be noted that even state taxation of foreign importation of liquors has been sustained by this Court, despite the effect of the export-import clause, in recognition of state power under the Twenty-first Amendment. *Gordon* v. *Texas*, 355 U. S. 369 (1958), aff'g 166 Tex. Cr. R. 24, 310 S. W. 2d 328.

Appellee has not only misinterpreted the application of the doctrine, but has distorted the facts in referring to its resale of "unopened and original packages" of liquors (Appellee's Br., p. 15). Appellee purchases its liquors in cases (R. 141-142) which remain stored at its premises until each bottle has been resold by appellee to its customers (R. 142). Since the average sale by appellee to each customer involves two bottles of liquor (R. 144-145), it is evident that each case of liquor purchased and received by appellee must be opened at its premises and sold by the individual bottle rather than by the original case.

In any event, since *Waring* v. *Mayor of Mobile*, 8 Wall. 110 (1868), it has been recognized that imported articles lose their immunity from state taxation upon their first sale. Here, at least two sales necessarily take place before appellee receives its liquors—the sale by either the importer (at least 60% of appellee's liquors are imported, R. 123) or the domestic manufacturer to the wholesaler, and the sale by the latter to appellee (R. 105). Of course, any number of intermediate sales among wholesalers can also take place before liquors are sold to appellee. When appellee in turn resells its liquors to its customers (R. 143, 145-146), this constitutes at least the third sale of the liquors. Obviously, the export-import clause can not provide the parties to each of these separate sales with immunity from state liquor licensing laws as well as state tax statutes as appellee erroneously contends. *Cf. Canton R. Co.* v. *Rogan*, 340 U. S. 511, 515 (1951); *Western Maryland R. Co.* v. *Rogan*, 340 U. S. 520 (1951).

Moreover, since appellee resells its liquors to its customers in New York prior to their departure, it is not appellee but its retail customers, the airline passengers, who would be responsible for any alleged exportation. Indeed, appellee's activities in purchasing, receiving, storing, soliciting orders for and selling alcoholic beverages—the very acts that are at issue here as having been conducted in the absence of a state license—are all performed prior to any alleged act of exportation. Under such circumstances, neither a plan and intention to export nor eventual exportation of articles would provide immunity from state jurisdiction. *Empresa Siderurgica, S. A.* v. *Merced*, 337 U. S. 154 (1949); *Joy Oil Co.* v. *State Tax Comm'n*, 337 U. S. 286 (1949).

III. Appellee's private premises do not conform to federal warehousing requirements, nor are appellee's operations conducted under customs "escort".

We have demonstrated in our main brief (pp. 30-32) that appellee's private premises, where its liquors are stored awaiting resale, do not comply with the requirements for either a customs bonded warehouse or a bonded manufacturing warehouse set forth in 19 C.F.R. §§ 19.1(c) and 19.13(g).

While not disputing its inability to meet these requirements, appellee attempts to color its operations by describing its premises as a "space on the second floor of the Arrivals Building at Idlewild in the very center of the Bureau's customs controls and directly across the hall from the Chief Collector of Customs at Idlewild" (Br. 34-35). It is immaterial that appellee's office is one of many private gift shops in the Arrivals Building in close proximity to the offices of the Customs Bureau. What is important is the fact that, contrary to the requirements of the foregoing federal regulations, there is no customs warehouse officer in charge and in attendance at appellee's premises to witness the entry and withdrawal of liquors, and to insure that all persons having access to such premises shall be under his detection (R. 133).

Appellee's reference to its operations as being conducted "under escort of the Bureau of Customs" (App's. Br. pp. 3, 8) is also contradicted by appellee's admissions at the trial. In addition to conceding that there is no customs warehouse officer in charge and in attendance at appellee's premises where the liquors are stored (R. 133), appellee's president admitted that no customs officer is assigned to be present when liquors are removed from suppliers' trucks to appellee's premises (R. 104), when liquors are delivered

to a plane (R. 136-137) or while they are aboard the plane (R. 137-138).

Nor is there evidence to support appellee's repeated references to its space as having received customs "approval". Appellee did not introduce any written evidence of customs approval of its premises, and its president admitted that no written approval of the plans was received (R. 155). The introduction of appellee's floor and elevation plans as an exhibit (Pl. Exh. 4, R. 163) is meaningless, since there is no written statement or notation, on the exhibit or otherwise, which in any manner suggests customs approval of the plans in evidence. Nor did appellee produce at the trial any customs official to testify even as to alleged oral approval (assuming such approval could have any legal value) of its operations or plans.

IV. Section 308 of the Tariff Act of 1930, now repealed and until now not invoked by appellee, was never applicable to appellee's operations.

Appellee now argues for the first time (Br. pp. 46-47, 49-50) that its operations are within the meaning of § 308 of the Tariff Act of 1930 (19 U.S.C.A. §1308)—despite the absence of any reference to this section in its complaint. Certainly appellee is remiss in not noting that § 308 was expressly *repealed* by Act of Congress in 1962 (Pub. L. 87-456, Title III, § 301 (a), May 24, 1962, 76 Stat. 75).

Even prior to its repeal, § 308—in providing for the temporary duty-free importation of articles "when not imported for sale or for sale on approval"—was plainly inapplicable to appellee's purchase and resale liquor operations. Furthermore, the same congressional history which clearly rebuts the contention that a customs duty statute such as § 311 of the Tariff Act pre-empts State liquor laws (see appellants' brief pp. 33-37) would equally apply to § 308.

V. The statutory construction of the New York Alcoholic Beverage Control Law is not involved in this case.

Appellee now tries to argue for the first time that its liquor operations do not constitute "selling" within the definition of New York Alcoholic Beverage Control Law § 3, subd. 28. No question of statutory construction was raised by appellee in its complaint or at the trial. Rather, appellee's position was that its operations, regardless of the language of New York's liquor licensing laws, were immunized from their requirements by reasons of the Commerce and Supremacy Clauses of the Federal Constitution and because of the assertedly pre-emptive provisions of § 311 of the Tariff Act of 1930 and the regulations adopted thereunder (see, *e.g.*, Compl., par. 11, R. 7-9, and relief requested, R. 10-11). Since only these federal questions were involved rather than issues of New York statutory construction, appellants did not need to press the third defense in their answer (R. 64) concerning equitable abstention. If appellee now wishes to contest the question of whether its operations are within New York's definition of "selling", we would be constrained to argue that this question should first be resolved by an interpretation of the New York State Courts under the familiar principle of equitable abstention. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

In any event, appellee has grossly misinterpreted the definition of selling in § 3, subd. 28, which provides:

> "'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intention to sell and shall include the delivery of any alcoholic beverage in the State."

Appellee apparently would read the words "and shall include the delivery" in a limiting sense, as if it read

"and *must* include". Such interpretation is in conflict with the New York principle that in dealing with legislation enacted for the protection of the public, the word "including" shall be used illustratively so as to broaden rather than narrow the statutory definition. *Red Hook Cold Storage Co.* v. *Dept. of Labor*, 295 N. Y. 1, 7-8 (1945). Moreover, appellee's interpretation is inconsistent with the facts of record, since there are continual deliveries to appellee's private premises in New York of the liquors sold to appellee by its wholesale suppliers (R. 104-106).

VI. The inter-departmental communications between the State Liquor Authority and Attorney General in 1960 do not constitute admissions of fact.

Appellee erroneously treats the letters of the State Liquor Authority of April 22 and May 9, 1960 (R. 158-162) and the Attorney General's opinion of June 30, 1960 (R. 17-19) as concessions concerning the facts of appellee's operations. These inter-departmental communications were issued in response to appellee's original inquiry as to whether its proposed operations required a state license. They were written prior to any indication that this litigation would be instituted and without any awareness that appellee would actually begin operations in the absence of a state license. The State Liquor Authority and the Attorney General routinely treated appellee's inquiry as presenting a hypothetical legal question and merely restated the very facts as appellee had provided them without any independent investigation. It is absurd to contend that the State Liquor Authority is bound by the hypothetical facts originally presented by appellee so as to preclude this Court from considering the actual facts concerning appellee's operations as described at the trial by its president.

VII. Appellee misconceives the extent of state power under the Twenty-first Amendment.

Appellee attempts to dismiss the numerous authorities cited in our main brief (pp. 9, 14-18) which rejected the contention that state power over intoxicating liquors may be limited by the Commerce Clause, by claiming that these decisions all dealt with *interstate* traffic. Apparently, appellee has ignored our reference to *Gordon* v. *Texas*, 355 U. S. 369 (1958); *De Bary & Co.* v. *Louisiana*, 227 U. S. 108 (1913); and *Wylie* v. *State Board of Equalization*, 21 F. Supp. 604 (S. D. California, 1937). In each of these cases, state liquor laws were sustained despite their application to foreign commerce. Moreover, in *De Bary* v. *Louisiana*, *supra*, this Court expressly rejected the contention, now raised by appellee, that any distinction could be be drawn between the effect of state control on foreign, as opposed to interstate, commerce in intoxicating liquors.

Nor is there any basis for appellee's contention that the purpose of the Twenty-first Amendment was limited to protecting the "dry" states from interference by the "wet" states. This same argument was raised by the plaintiff in *American Travelers Club, Inc.* v. *Hostetter*, 219 F. Supp. 95 (S.D.N.Y., 1963), and was rejected in the following language of Judge MEDINA, speaking for a unanimous three-judge Court (p. 108, n. 17):

> "Nor is there any merit in plaintiff's contention that only 'dry' states are given regulatory power under the Twenty-first Amendment. The cases are numerous in which the Supreme Court has held the Amendment applicable to 'wet' and 'semi-wet' states. See *Gordon* v. *Texas*, 1958, 355 U. S. 369, affirming, 310 S. W. 2d 328; *Ziffrin, Inc.* v. *Reeves*, *supra*, 308 U. S. 132; *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 1939, 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick*, 1939, 305 U. S. 395; *Mahoney* v. *Joseph*

Triner Corp., 1938, 304 U. S. 401; *State Board of Equalization* v. *Young's Market Co.* 1936, 299 U. S. 59; see also *Idlewild Bon-Voyage Liquor Corp.* v. *Epstein, supra,* 212 F. Supp. 376 (assuming Twenty-first Amendment is otherwise applicable to New York State)."

VIII. Appellee offers no authority which would support the decision below.

Appellee's reliance on *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, and on *C. J. Tower & Sons* v. *United States,* 135 F. Supp. 874, is ill founded. While these decisions recognized the right of Congress to legislate in areas affecting traffic in alcoholic beverages, they do not hold, nor has this Court ever held, that federal legislation may be exercised in hostility to and denial of state authority under the Twenty-first Amendment. Indeed, the Federal Alcohol Administration Act, which was sustained in the *Jameson* case, insures against possible conflict with state liquor laws by requiring the Secretary of the Treasury to deny the issuance of a federal permit to engage in liquor operations involving interstate and foreign commerce upon finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted" (27 U.S.C. § 204 (a) (2) (c)).

Nor are decisions dealing with liquors confined to federal reservations, such as *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518; *Yellow Cab Transit Co.* v. *Johnson,* 321 U. S. 383; and *During* v. *Valente,* 267 App. Div. 383, 46 N.Y.S. 385, applicable to the case at bar. Each of these decisions was predicated upon a state legislative surrender of control over articles within territory ceded to the Federal Government. The liquors in the instant case are not on or within federally ceded territory, but are delivered to, stored and sold from appellee's private premises

at Idlewild Airport on land which, as the court below recognized (R. 193, n. 4), is subject to the jurisdiction of the State of New York. It may also be noted that the lease between appellee and the Port of New York Authority (Sec. 6, R. 167) and the basic lease between the Port Authority and the City of New York (Sec. 41, R. 170-171), require the lessee to "procure from all governmental authorities . . . all licenses, certificates, permits or other authorization which may be necessary for the conduct of its operations" and to pay all taxes that may be imposed on its property or operations.

The dictum which appellee borrows from *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68 (1st Dept.), to the effect that the regulatory powers of the State Liquor Authority do not extend to international transactions in alcoholic beverages, was based upon an erroneous reading of *During* v. *Valente*, 267 App. Div. 382. The *During* case, which held that liquor stored for export in a free-trade zone was free of state regulation, was plainly based upon the premise that the state statutes authorizing the free-trade zone in Staten Island (the only one in New York) constituted a legislative surrender of the right to enforce state regulations in that zone, and cannot be extended beyond that particular premise.

To counter the many decisions of this Court consistently recognizing the right of the states to control traffic in intoxicating liquors (Appellants' Br. p. 9), appellee relies on the decision of the 53rd District Court of Travis County, Texas in *Ammex Warehouse Co.* v. *Texas Liquor Control Board*, No. 123485, and the Federal District Court opinion in *Ammex Warehouse Co.* v. *Department of Alcoholic Beverage Control*, 224 F. Supp. 546 (S. D. California, 1963). In both these *Ammex* cases all liquors were held in storage in a United States bonded warehouse under government lock and key, and were received and withdrawn under constant watch of *assigned* customs officers. Custom

officers physically handled deliveries of liquors on federal territory to the intended purchasers. Although the legal conclusions reached in both cases appear to be questionable to say the least, in light of previous decisions of this Court recognizing state power under the Twenty-first Amendment, it must be recognized that the particular facts of both *Ammex* cases are in no way comparable to the nature of appellee's operations in which liquors are stored in private premises at Idlewild Airport rather than a governmental bonded warehouse and where no customs officers are assigned to watch the liquors at the time of their entry, storage, withdrawal, delivery aboard airplanes or ultimate delivery.

CONCLUSION

The judgment of the United States District Court for the Southern District of New York should be reversed and the case should be remanded to the statutory court with instructions to dismiss the complaint and to award judgment to appellants on the merits, with costs.

Dated: New York, N. Y., February 28, 1964.

Respectfully submitted,

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